

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6049

To be argued by
J. CHRISTOPHER JENSEN

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-6049

COUNTY OF SUFFOLK, COUNTY OF NASSAU, TOWN OF ISLIP, TOWN OF HEMPSTEAD,
TOWN OF NORTH HEMPSTEAD, TOWN OF OYSTER BAY, TOWN OF HUNTINGTON,
and the BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON AND CONCERNED
CITIZENS OF MONTAUK, INC.,

Appellees,

—against—

SECRETARY OF THE INTERIOR, et al.,

Appellants,

NATIONAL OCEAN INDUSTRIES ASSOCIATION, et al.,

Intervenor-Appellants.

THE NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Appellees,

—against—

THOMAS S. KLEPPE, Secretary of the Interior,

Appellant,

NATIONAL OCEAN INDUSTRIES ASSOCIATION, et al.,

Intervenor-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR FEDERAL APPELLANTS

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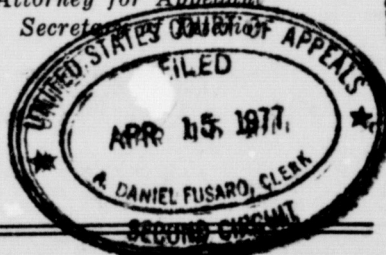


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THOMAS S. KLEPPE, Secretary of the Interior,
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BRIEF OF FEDERAL APPELLANTS

Preliminary Statement

The federal defendants-appellants appeal from a
Judgment entered on February 17, 1977, declaring null
and void all leases granted by the Secretary of the United

States Department of the Interior for the right to explore and develop oil and gas in the outer Continental Shelf of the Mid-Atlantic Ocean ("Sale 40 leases"), and enjoining the exercise of any powers purportedly granted by such leases. This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. The case was tried by the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York. Judge Weinstein's findings of fact and conclusions of law are contained in a Memorandum Decision and Order dated February 17, 1977,¹ in which he nullified the oil and gas leases because of the Secretary of Interior's ("the Secretary") alleged violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, in reaching the decision to conduct the federal oil and gas lease sale (lease sale 40).

Issues Presented for Review

1. Does the environmental impact statement prepared by Interior for the oil and gas lease Sale 40 satisfy the requirements of NEPA?
2. Was it proper for the District Court to conclude that the Secretary's decision to conduct the lease sale was arbitrary and capricious?
3. Was it proper for the District Court to have nullified the Sale 40 leases and to have enjoined the appellants from further proceeding with the exercise of any powers purportedly granted by such leases?

¹ The unreported opinion is set forth in the Joint Appendix at J.A. 18. All references are to the Appendix except for references to the two environmental impact statements that will be clearly designated as such. See fn. 6 *infra*.

Statement of the Case

Appellees brought these actions² to enjoin the Secretary from conducting the national program of accelerated oil and gas leasing in the outer Continental Shelf ("OCS") and specifically to enjoin the oil and gas lease Sale 40 for the Mid-Atlantic OCS. After the Secretary announced his decision to proceed with Sale 40 on June 30, 1976, the appellees moved to preliminarily enjoin the sale that was scheduled to take place on August 17, 1976 and to enjoin the national accelerated leasing program. The individual lease sale was authorized by the Secretary pursuant to Section 8 of the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. § 1337.

The District Court held an 11 day hearing on appellees' motions for a preliminary injunction in late July and early August, 1976. On August 13, 1976, Judge Weinstein entered his memorandum decision and order granting a preliminary injunction against lease Sale 40 *only* on the ground that the Secretary had violated NEPA in one respect—by inadequately considering the effect of coastal states' land-use controls upon the probable environmental impacts of the proposed oil and gas development.

Appellants immediately sought review of Judge Weinstein's preliminary decision in this Court by moving to stay the District Court's order. After hearing argument,

² The District Court judgment was granted in two actions, *County of Suffolk, et al. v. Secretary of the Interior, et al.*, U.S. D.C., E.D.N.Y., Civil Action No. 75 C 208 and the *Natural Resources Defense Council, Inc. v. Secretary of the Interior*, U.S.D.C., E.D.N.Y., Civil Action No. 76 C 1229. These two actions were consolidated by the District Court on July 20, 1976. The State of New York was originally a party plaintiff in the latter action but voluntarily withdrew by filing a stipulation of dismissal on January 7, 1977.

a panel of this Court entered an order on August 16, 1976, staying the enforcement of the preliminary injunction on the grounds that the appellees had failed to establish that they would suffer irreparable injury from lease Sale 40, and that the national interest in obtaining energy independence would be damaged if the sale were aborted. (J.A. 355).

On the day of the sale, August 17, 1976, appellees applied to Mr. Justice Thurgood Marshall of the United States Supreme Court for an order vacating the stay of this Court and reinstating the preliminary injunction against the sale. Justice Marshall refused to grant appellees' application and the sale was held as scheduled.³

The appellants continued to perfect their appeal from the preliminary injunction order and the matter was briefed and argued before this Court on the entire record. On October 14, 1976, a second panel of this Court filed its decision reversing Judge Weinstein's order on the ground that appellees had not established any irreparable injury from the resulting lease sale and on the ground that, on the full record, appellees had not demonstrated any probability of succeeding on their NEPA claims. (J.A. 364).

At the sale, Interior offered 154 tracts of submerged lands for leasing and received 410 bids on 101 of those tracts. Under the cash bonus bidding procedures of the OCS Lands Act, 43 U.S.C. § 1337(a), the bidders offered cash bonus bids in the total amount of 3.5 billion dollars. (J.A. 2721). Interior ultimately accepted 93 of the high bids, totalling 1.128 billion dollars. Leases were executed for the exploration and development of the oil and gas

³ Justice Marshall's decision is reported *sub nom State of New York v. Kleppe*, — U.S. —, 97 S.Ct. 4, (1976).

reserves on these 93 tracts and the 1.128 billion dollars was paid to the United States Treasury by the successful bidders. In addition, the lessees must pay a royalty of 16-2/3 percent, or for some tracts 33-1/3 percent, of the value of any oil and gas recovered from the leased tracts. 43 U.S.C. § 1337(a).

After the sale, the District Court directed that a final trial on the merits of the action be held in January, 1977.⁴ This 6-day trial consisted primarily of appellees' introduction of *de novo* testimony concerning the attitudes of local planners and officials toward OCS onshore development including pipelines and *de novo* expert testimony on the substantive merits of the Secretary's decision to hold the lease sale. The appellants, in turn, offered some rebuttal testimony on these issues.

After trial, final arguments on the entire record were made to the Court on February 14, 1977. On February 17, Judge Weinstein filed a 96 page final memorandum and order voiding the lease sale and enjoining lease activities essentially because of his view that the Secretary violated NEPA: 1) by failing to consider adequately the environmental impact of state and local exercise of regulatory powers; 2) by conducting a "defective" cost-benefit analysis of the lease sale; and 3) by failing to evaluate the possible separation of exploration and production leasing.

The Secretary and the intervenor-defendants, National Ocean Industries Association, etc., now appeal on the ground that Judge Weinstein was clearly erroneous in

⁴ The Court held this trial despite the urgings of appellants that additional *de novo* testimony was simply not required. (Federal Defendants' Pre-Trial Conference Memorandum, November 2, 1976). It should be noted that Judge Weinstein incorporated and reaffirmed as part of his final memorandum and order the text of his memorandum filed on August 13, 1976, granting the preliminary injunction. (J.A. 23).

finding that the Secretary violated NEPA. The federal appellants also submit that Judge Weinstein abused his discretion by voiding the billion dollar oil and gas lease sale despite the existence of reasonable alternative remedies, and despite this Court's prior ruling that the national interest in relieving the energy crisis would be clearly damaged if the sale were aborted.⁵

The Facts Relevant to the Issues Presented for Review

A. Introduction

The relevant facts in this action are derived from two distinctly different sources. First, there are the administrative record facts including the history of Interior's NEPA procedures for lease Sale 40 and the

⁵ Although this Court's review of a district court's findings under Rule 52(a) of the Federal Rules of Civil Procedure is generally limited to a "clearly erroneous" standard, *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) ("[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."); the law in this Circuit is that:

When a [judge's] finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions.

Crane Co. v. American Standard, Inc., 490 F.2d 332, 341 fn. 12 (2d Cir. 1973) citing 5A Moore, Federal Practice ¶52.03. We submit that Judge Weinstein's findings with respect to the Secretary's alleged NEPA violations are, in fact, clearly erroneous. *A fortiori*, this Court may reverse those findings under the more relaxed standard of review available in this case because the findings in question do not "resolve disputed facts". Judge Weinstein's conclusions of law, of course, are reviewable in their entirety by this Court. 5A Moore, ¶52.03[2].

prospective administrative procedures of Interior that will mitigate the environmental impacts of all future lease activities. For purposes of this appeal, the central elements of this administrative record are the final environmental impact statement for lease Sale 40 ("40 EIS"), and to a lesser extent, the programmatic environmental impact statement on the decision to accelerate OCS oil and gas leasing nationwide ("PEIS"). The primary issues raised in this appeal concern the adequacy of the environmental analysis and discussion of alternatives contained in the 40 EIS in particular.

The second source of evidence in this action is the *de novo* testimony introduced by the appellees on the preliminary injunction hearing and at trial and the testimony introduced by appellants in rebuttal. The appellees' testimony consisted primarily of "expert" attacks on the adequacy of the 40 EIS and PEIS and "expert" attacks on the substantive wisdom of the Secretary's decision to hold lease Sale 40. At the trial, appellees also introduced *de novo* testimony on the attitude of local officials toward onshore OCS development in an effort to provide a record for Judge Weinstein's preliminary decision that the Secretary had violated NEPA in one respect by failing to consider the possibility that affected coastal states might refuse to allow any OCS related onshore development.

Since Judge Weinstein rested his final decision almost exclusively upon this *de novo* testimony, we shall consider this evidence below in the context of our argument on the issues presented by this appeal. However, given the complexity of the OCS administrative procedures and the extensive scope of the 40 EIS, we shall first provide this Court with a descriptive overview of the Secretary's NEPA activity for lease Sale 40 and a descriptive summary of the 40 EIS discussion of the critical issue of

state and local land use regulations in relation to future OCS development onshore including the routing of oil and gas pipelines.

B. Interior's NEPA Activity for OCS Leasing and Lease Sale 40

The Department of the Interior has prepared, thus far, two environmental impact statements pursuant to Section 102(2)(c) of NEPA, 42 U.S.C. § 4332(2)(c), that pertain to oil and gas leasing on the outer Continental Shelf of the Mid-Atlantic Ocean. The first statement, the programmatic EIS ("PEIS"), was prepared to accompany the President's proposal to accelerate OSC oil and gas leasing including leasing in the so-called "frontier" areas of the United States OCS, i.e., areas of the Gulf of Mexico, the Atlantic coast, the Gulf of Alaska, and the California coast. The PEIS focused on the generic environmental impacts presented by such an accelerated leasing program (I PEIS 155-781, II PEIS 1-249). It also described alternatives to the proposal to expand off-shore leasing, including the possible development of on-shore oil and gas resources, oil shale, geothermal energy, solar energy, and energy conservation (II PEIS 301, *et seq.*).⁹

The 40 EIS is a site-specific EIS containing a general discussion of the Mid-Atlantic environment in the area of the proposed Sale 40 and of the regional environmental impacts that might result from a decision to hold the sale. The 40 EIS also duplicated to a certain degree and

⁹ Hereafter, references to the programmatic EIS will be cited as "PEIS" with appropriate volume and page numbers. References to the specific EIS for lease Sale 40 will be cited as "40 EIS" with appropriate volume and page numbers.

extended the discussion of alternatives to the proposed sale.

Interior's preparation of the PEIS occurred in several stages. In May of 1974, Interior announced that it was preparing a PEIS analyzing the President's proposal in January of that year to accelerate OCS leasing consistent with appropriate environmental safeguards. On October 18, 1974 Interior published a draft of the PEIS which was made available to the public and filed with the President's Council on Environmental Quality ("CEQ").

In November of 1974, Interior sponsored a coastal states Governor's conference in Washington, D.C., regarding the proposal to accelerate OCS oil and gas leasing nationwide. The purpose of the conference was to provide the interested Governors with Interior's rationale for its accelerated leasing goal and to discuss with them the various steps being proposed for the program. At that time a revised 4-year OCS planning schedule was announced. This schedule represented a change from the President's original proposal for leasing 10 million acres in 1975.

Public hearings were held on the draft PEIS in February, 1975, in Alaska, California and New Jersey. At these public hearings, 344 persons testified over the 9 days of hearings resulting in 3,019 pages of transcript testimony. Thereafter, Interior revised the draft PEIS in response to the testimony and written comments received at the public hearings.

On July 11, 1975, Interior published the 3-volume, 2700 page final PEIS on the revised accelerated leasing program. The final PEIS was filed with CEQ and the public was granted an extended 60-day period to review and to comment upon the PEIS (40 F.R. 29308).

Judge Weinstein, as well as a district court in California, have expressly held that the PEIS fully satisfied NEPA's requirements (J.A. 233). *People of the State of California v. Morton*, 404 F. Supp. 26 (C.D. Cal. 1975), *appeal pending*, 9th Cir. No. 76-1431.

On September 29, 1975, after consideration of the final PEIS the then Acting Secretary of the Interior, Kent Frizzel, announced his decision to adopt the accelerated OCS leasing program. One of the elements of this accelerated program was a proposed lease sale in the frontier area of the Mid-Atlantic OCS (Sale 40).

The proposal for lease Sale 40 was developed by the Bureau of Land Management (BLM) within the Department of Interior pursuant to the OCS Lands Act, 43 U.S.C. §§ 1331, *et seq.* BLM first identified a broad potential oil and gas lease area in the Baltimore Canyon Trough of the Mid-Atlantic coast. Then BLM requested resource reports from 13 federal agencies and bureaus, including the Geological Survey. Under the pertinent regulations these resource reports included a summary report from the Geological Survey "describing the general geology and potential mineral resources of the area" and reports from other appropriate agencies, "describing to the extent known any other valuable resources contained within the general area and the potential effect of mineral operations upon the resources or upon the total environment." 43 C.F.R. § 3301.2. *See also* I 40 EIS 6-13.

After a review of these environmental and resource reports, BLM delineated a tentative area of 1,151 tracts comprising 6.5 million acres for possible leasing. On March 26, 1975, BLM published a call for nominations by industry of tracts they would like to lease in the delineated area. (40 F.R. No. 59, March 26, 1975, III 40 EIS

524). At the same time, BLM requested state and local governments, environmental groups and the general public to specify tracts that in their view should not be offered for leasing. Industry responded by nominating 557 tracts, totaling 3.2 million acres, within the call area. III 40 EIS 525. Some general comments were also received from affected coastal states concerning the national policy aspects of the proposed sale, although such comments did not indicate any aversion to leasing specific tracts. (J.A. 1653-1655). The announcement of the call for nominations stated that the tentative tract selections would be the subject of an environmental impact statement to be prepared by BLM, in accordance with NEPA. The selection of tracts for leasing, as well as the decision to lease itself, would ultimately depend upon the information developed in the 40 EIS and the comments received thereon. (Id.).

After receiving the nominations BLM representatives met with representatives of the Geological Survey to develop tentative tract selections from the nominated tracts. Representatives from all of the affected Mid-Atlantic coastal states attended and participated in these discussions. III 40 EIS 526. The initial step in the tract selection process was the identification of the tracts considered by industry and Geological Survey to have high hydrocarbon potential. (J.A. 1646-1648 and 2679-2688). These tracts were then examined for obvious environmental conflicts and hazards. At least sixteen environmental criteria were considered to determine the degree of impact resulting from offshore exploration and development, including bottom stability, seismic activity, wildlife, marine habitats, cultural resources, and various physical processes. Environmental and other considerations that led to the elimination of certain tracts at this stage were the importance of certain tracts to the commercial fishing

industry and geological hazards. Interference with navigation was also considered and tracts wholly within shipping lanes were excluded. I 40 EIS 11-13.

The tentative tract selections were announced on August 20, 1975. As a result of the tract selection process, the 557 tracts nominated by industry were reduced to 154 tracts tentatively selected for the proposed lease Sale 40. I 40 EIS 10. These tentative tract selections then became the focus of the site-specific environmental impact statement for Sale 40. BLM first conducted extensive studies and analyses of potential impacts of oil and gas development in the proposed sale area to provide an information base for a draft EIS. In August and October, 1975, interested parties and state representatives were given an opportunity to review the working draft of the 40 EIS in the New York BLM offices. Information and comments were also obtained from 8 separate federal agencies and 23 bureaus for use in preparation of the draft 40 EIS.

The draft 40 EIS was formally published on December 10, 1975, and made available to the public and to CEQ. BLM then solicited and received voluminous written comments from government agencies and private groups on the draft. Public hearings on the draft were held in Atlantic City, New Jersey, in January, 1976. The testimony of the 137 witnesses at this public hearing and the written comments were then reviewed by BLM. In light of these comments BLM revised its draft and published the 40 EIS in final form on May 25, 1976. The final 40 EIS had been expanded to include a third volume that, with the exception of an appendix, is devoted exclusively to publishing verbatim the comments received from other federal and state agencies and interested members of the public, and to responding to the issues raised by those comments.

As part of the internal decision-making processes of Interior, a program decision option document (PDOD) was prepared for lease Sale 40 in order briefly to set out the decision options available to the Secretary. Incident to describing the decision options, the sale 40 PDOD contains a brief description of the proposed sale and the background leading up to the proposal. The document also contains some minimal discussion of the social, environmental and economic issues presented by a decision to conduct the proposed sale. The Secretary then reviewed the 40 EIS and PDOD and several other memoranda prepared by various Assistant Secretaries and bureau heads within Interior. (J.A. 3216-3233). A decision meeting was held on June 28, 1976 with these latter individuals and the Secretary formally announced his decision to conduct lease Sale 40 on June 30, 1976. (J.A. 2541 and 3230).

On August 17, 1976, lease Sale 40 was held in New York, as set forth above. Leases were subsequently executed for all of the 93 tracts that were accepted for leasing by the Secretary.

C. Interior's Post-Sale Environmental Activity

Pursuant to the OCS Lands Act, 43 U.S.C. § 1337(b), the lease contract grants the lessee 5 years in which to discover oil and gas in paying quantities, or to undertake drilling or well reworking operations as approved by the Secretary. If a discovery is made within this period, the lease will be extended for as long as oil and gas may be produced in paying quantities. Before exploratory drilling may be initiated under the lease, the lessee must submit an application for a permit to drill to the Geological Survey of the Department of Interior. 30 C.F.R. 250.34. The Geological Survey will only grant the exploratory permits after satisfying itself that the lessees can meet certain safety and environmental requirements.

To provide information to the coastal states and thereby to assist them in their planning for OCS related onshore developments in the exploratory phase, the lessees are required to submit a "notice of support activity for the exploration program" to the coastal states for review and comment prior to approval of exploration plans. This notice must include a description of all the onshore and nearshore facilities contemplated for use in exploration, the amount of acreage expected to be required for onshore facilities, an estimate of anticipated employees, the impact on local populations, and an estimate of supplies and equipment to be procured within the coastal state. (Lease Stipulation No. 7, J.A. 3236).

If a lessee finds economically favorable quantities of oil and gas during exploration, he must submit a development plan to Interior for approval. 30 C.F.R. § 250.34(b). Cecil D. Andrus, the Secretary of Interior, announced on March 1, 1977, that an additional site-specific environmental impact statement will be prepared by Interior prior to approval of the development plans submitted by the lessees. (J.A. 3650).

In addition, an OCS operating order promulgated by Geological Survey (OCS Order No. 15, 41 F.R. No. 204, October 20, 1976) requires the OCS lessees to submit detailed information to the affected coastal states concerning possible onshore development. The order requires that at least 30 days prior to submission of development plans for approval by the Geological Survey, the lessee must provide the affected coastal states with information concerning:

1. The location as to county or local government, the size of any offshore and land-based facilities to be constructed or acquired and the nature of the activities to be conducted;

2. The means to be used to transport oil and gas to shore, including the routes to be followed by such transportation and the amount of oil and gas to be transported;

3. An estimate of ship and plane arrivals and the onshore location of the arrival terminals;

4. The requirements for land, labor, materials and energy for each proposed offshore and land-based facility; and

5. The timing of the development, including an estimate of the sequence of events and the time required for development.

Interior must then consider the comments from appropriate state personnel and the development plan EIS prior to granting approval of the development plans. 30 C.F.R. §§ 250.11 and 250.34.

After the implementation of the coastal zone management programs in the various states, the development plan approvals and other permitting activity of the various federal agencies with respect to OCS oil and gas development will also be subjected to the consistency provision of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456, as amended. Section 307(c)(3)(a), July 26, 1976. See discussion below at pages 35-37.

Approval of development plans starts the monitoring of development and production activities by the OCS oil and gas supervisor. If the monitoring indicates that development or production operations are causing unacceptable environmental impacts, the supervisor may suspend the lessee's operations, if necessary, to protect the environment. 43 U.S.C. § 1334(a)(1), 30 C.F.R. § 250.12 (c). Leases may even be cancelled for violations of the OCS Lands Act and regulations thereunder in effect at

the execution of the lease. 43 U.S.C. § 1334(b)(1) and (2).

All of the exploration, development and production activities under these leases are also subject to the specific environmental controls set forth in special lease stipulations and in the OCS operating orders. For example, the lease stipulations for Sale 40 mandate such environmental restrictions as requiring the lessees to conduct surveys to determine important historical and archeological resources and areas of special biological significance. Then the lessee shall be required to locate his offshore operations to avoid these areas. (Lease Stipulations 1 and 2 (J.A. 3235)). The lessees are also required by the lease stipulations to use a minimal number of structures for drilling and production to avoid interference with fishing and navigation. (Lease Stipulation 3, J.A. 3235); and of course, the stipulations require the use of pipelines in corridors designated by Interior, if technically and economically feasible and if pipeline rights of way can be obtained. (Lease Stipulation 4, J.A. 3235).

The OCS operating orders promulgated by Geological Survey for sale 40 also impose significant environmental controls on the lease activities, including requirements for such items as:

- A. *Drilling Procedures*—OCS Order No. 2 includes specific provisions relating to all exploratory and initial development wells, with the condition that development wells will be drilled in accordance with field rules established by the Supervisor for individual fields. Also included in the order are extensive requirements for approval of an application to drill, relating to well casing, blowout prevention equipment and mud control. (J.A. 3243).
- B. *Safety Devices*—OCS Order No. 5 includes specifications on subsurface safety devices for all wells to prevent and control blowouts. (J.A. 3247).

C. *Pollution and Waste Disposal*—OCS Order No. 7 sets forth specific requirements for liquid and solid waste disposal and provides that operators maintain the most effective equipment available as approved by the Supervisor for standby pollution control. (J.A. 3249).

D. *Public Inspection of Record*—OCS Order No. 12 provides for public inspection of certain records pertaining to OCS leases and wells. (J.A. 3250).

The operating orders are particularly important because they can be continually revised and adopted to mitigate any evolving environmental impacts of subsequent lease activity.

D. The 40 EIS Analysis of State-Local Land Use Control and Onshore OCS Development

At the very beginning of Volume I of the 40 EIS, there is an 11 page discussion of the relationship of OCS development to other governmental programs including the State Coastal Zone Management planning programs. (I 40 EIS 39-49). The section describes the parameters of Coastal Zone Management planning in each of the affected coastal states and the timetable for each state's planning process. The EIS further states that all onshore development associated with offshore oil and gas operations "can ultimately be broadly controlled by the states." (I 40 EIS 40).

Immediately after the discussion of the state coastal zone management planning, the 40 EIS contains a section on special state legislative restrictions on development in the coastal zone (I 40 EIS 50-52) and a section on other planning mechanisms of the Mid-Atlantic coastal states

that affect the coastal zone. (I 40 EIS 58-61). The discussion of these state mechanisms recognizes that "any OCS-related facility development in the coastal zone would be subject to these [state] regulations." (I 40 EIS 50).

Volume II of the 40 EIS also contains discussions of state and local regulatory authority from the point of view of its possible mitigating effect on the potential environmental impacts of Sale 40 (II EIS 426-430). This section of the EIS generally sets forth, state by state, the existing state environmental statutes affecting development in environmentally sensitive areas. The section also describes the various permits (*e.g.*, tidal wetlands permits, emission control permits, and effluent discharge permits) that must be obtained from the coastal states for any onshore development. (*Id.*). Then follows a discussion of state programs that affect oil discharges and clean-up. (II 40 EIS 434-438).

In addition, Volume II of the 40 EIS contains a 17 page analysis of the federal, state and local regulatory authority as it might affect specific types of OCS related onshore facilities. (II 40 EIS 449-466). The section analyzes these layers of regulatory authority with respect to the four major types of onshore facilities associated with offshore oil and gas operations: 1) Terminal and storage facilities; 2) Onshore operations bases; 3) Gas processing plants; and 4) Pipelines (onshore portions). Throughout this section, the EIS discussion recognizes that the *siting* of these four types of onshore facilities ultimately depends upon the exercise of local land use controls. (II 40 EIS 450-451, 453-454, and 456).

In particular, there is a discussion of the state regulatory authority over pipelines and the means by which the Secretary will coordinate pipeline planning with the

states. (II 40 EIS 457). If commercial quantities of oil and gas are discovered, BLM will initiate pipeline corridor management studies to identify the least environmentally hazardous areas in which to require the placement of pipelines. These studies will be conducted with the participation of industry and the affected coastal states and will be coordinated with all of the other relevant federal, state and local authorities. (*Id.*). The pipeline discussion states that the "ultimate approval [of pipeline sites] . . . would be within the jurisdiction of the State." (II 40 EIS 586).

Volume III of the EIS contains further discussion of state authority over pipelines as a response to comments received on the draft 40 EIS. (III 40 EIS 31, 64). The same type of discussion of state regulatory authority over all OCS related onshore development, including pipelines, is contained in the EIS for the accelerated leasing program. (*See, e.g.*, I PEIS 131-133; II PEIS 193-194, 774, 908-909, 951-952, 1004-1005).

The 40 EIS indicates that existing transportation rights-of-way, such as highway corridors, railroad corridors, and utility corridors may be the most economical and environmentally desirable locations for the onshore portions of pipelines and, thus, may influence the location of those pipelines. (II 40 EIS 285-286). This section generally identifies the possible locations of pipeline terminals, oil storage terminals, and gas processing plants. (II 40 EIS 279-291). Volume II of the 40 EIS also briefly describes the possible location of onshore pipeline corridors (II 40 EIS 227-229), although the EIS then refers the reader to the discussion of state and federal controls over pipeline landfalls where it is recognized that "[s]tate and local planning and regulatory authorities provide the primary framework" for the location of pipelines and related onshore development. (I 40 EIS 456).

The 40 EIS analysis emphasizes the possible environmental impacts of pipelines because of the requirement imposed by lease stipulation 4 (J.A. 3235) in the Sale 40 leases that crude oil production may not be transported ashore by surface vessels (i.e., tankers) if "*feasible pipeline rights-of-way can be determined and obtained* and if laying such pipelines is technically and economically feasible." (emphasis added). However, the 40 EIS nonetheless analyzes the possibility that oil tankers may be utilized if pipelines prove not to be "technically or economically feasible" or rights-of-way cannot be obtained within the meaning of the lease stipulation. (I 40 EIS 15; II 40 EIS 20-21).

Thus, the 40 EIS states that factors which could hinder or prohibit use of pipelines under the lease stipulation include: 1) a volume of resources uneconomic for pipeline transport; 2) a situation where the producing geologic structures are too widespread in relation to each other; and 3) the receptivity of state and local jurisdictions to the approval of the necessary pipeline landfalls. (II 40 EIS 20 fn. 1).

The 40 EIS proceeds to hypothesize that all of the crude oil estimated to be produced over the 25 year life of the lease area will be transported ashore in surface vessels. Then, in an effort to quantify the amount of oil that could be spilled from this tankering, the 40 EIS projects the maximum worst case amount of oil spill based upon historical worldwide oil spill figures.

The PEIS also expressly recognizes that OCS oil may be transported ashore by tankers in lieu of pipelines. (I PEIS 60). The PEIS discusses the types of tankers and barges that might be employed in OCS activities. (I PEIS 60-63). The PEIS also contains 30 pages of discussion of oil spill accidents, including those associated

with tanker accidents. (II PEIS 26-55). This latter section contains a detailed comparison of oil spillage rates (throughput spillage rates) for: 1) pipelines only; 2) tankers only; and 3) tankers and pipelines. (II PEIS 46-47). Finally, the PEIS describes a study prepared by the Massachusetts Institute of Technology on the probability of large oil spills for both pipelines and tankers. (II PEIS 56-59).

ARGUMENT

I.

The Secretary Has Complied With NEPA In Good Faith By Preparing And Considering An Adequate Environmental Impact Statement For Lease Sale 40.

A. Introduction

Despite Judge Weinstein's earlier finding that the 40 EIS and the accompanying PDOD "satisfactorily meet both the spirit and letter of NEPA requirements in all respects except one" (J.A. 29-30), his final memorandum decision concludes that the defendants violated NEPA in several respects. In so doing, Judge Weinstein does not cite and has apparently chosen to ignore the recent decisions by four other federal courts rejecting challenges to OCS oil and gas leasing on NEPA grounds virtually identical to those asserted by the appellees in this action. *Sierra Club v. Morton*, 510 F.2d 813 (5th Cir. 1975) (MAFLA); *People of the State of California v. Morton*, 404 F. Supp. 26 (C.D. Cal. 1975), appeal pending (9th Cir. 1976); *Southern California Association of Governments, et al. v. Kleppe, et al.*, — F. Supp. —, 8 E.R.C. 1922 (D.D.C., Civil Action No. 75-1942, Slip opinion denying preliminary injunction filed Decem-

ber 5, 1975); and *State of Alaska, et al. v. Kleppe, et al.* (D.D.C., Civil Action No. 76-0368, Slip opinion unreported), *appeal pending* (D.C. Cir.). These cases all involved challenges to Interior's accelerated OCS leasing program and to specific OCS sales in so-called "frontier" areas such as the Mid-Atlantic. These Courts specifically considered and rejected the very arguments that form the basis of Judge Weinstein's decision, i.e., 1) that the sale EIS did not adequately analyze the location and environmental impact of potential oil and gas pipelines (*Sierra Club v. Morton, supra*, 510 F.2d at 823-824); 2) that the Secretary did not adequately evaluate the "alternative" of separating exploration and development activity (*Id.* 510 F.2d at 825-826); 3) that the Secretary did not perform an accurate cost-benefit analysis of the proposed lease sale (*Id.* 510 F.2d at 827), *People of the State of California v. Morton, supra*, 404 F. Supp. at 31-32; and 4) that the commitment to offshore leasing was made prior to the preparation of the sale EIS (*Id.*). Yet Judge Weinstein found against the Secretary on precisely these issues without once discussing or even citing these other decisions!

We believe Judge Weinstein's omission is symptomatic of the clear error of law that pervades his final memorandum decision. Rather than applying the "rule of reason" analysis that is mandated by the Supreme Court, *Kleppe v. Sierra Club*, 427 U.S. 390, 410, fn. No. 21 (1976); *State of New York v. Kleppe*, — U.S. —, 97 S.Ct. 4 (1976) (J.A. 357), Judge Weinstein took the 40 EIS out of its legal and factual context and faulted it for not containing precisely the kind of "crystal ball inquiry" that is not required under NEPA. *NRDC v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972). On the "cost-benefit" issue, Judge Weinstein engaged in a substantive analysis of the socio-economic wisdom of the Secretary's decision and sub-

stituted his judgment, in effect, for that of the Secretary on *de novo* expert testimony. Finally, on the issue of the "alternative" of separating exploration and development, the Judge simply misunderstood the nature of the decision making process within Interior and thereby ignored the substantial evidence in the record that this alternative had been discussed and debated at length within Interior prior to the lease Sale 40 decision.

Given these demonstrable errors of law, there was absolutely no basis for the order voiding lease Sale 40 and enjoining all future lease activity. Even if Judge Weinstein was correct in his analysis of the NEPA violations, he abused his discretion in choosing the most onerous remedy when even he acknowledged the existence of reasonable alternative remedies. This abuse of discretion is all the more apparent in view of this Court's prior decisions that the lease Sale 40 itself did not constitute the kind of immediate and irreparable injury to the appellees that would necessitate injunctive relief. Thus, we respectfully submit that the judgment entered herein must be reversed in its entirety.

B. The "Rule of Reason" as Applied to the 40 EIS Treatment of Onshore OCS Development in Relation to State and Local Regulatory Authority

The primary basis for Judge Weinstein's final decision is that the Secretary "ignored the practical effects of local governmental licensing, permitting and review powers in the NEPA documents" pertaining to lease Sale 40. (J.A. 29). A sub-species of this contention is the Court's finding that the Secretary failed to consider the environmental impacts of "specific probable pipeline routes" on the shores of nearby coastal states.

These two related contentions must be examined in the light of the "rule of reason" that governs judicial review of environmental impact statements prepared pursuant to Section 102(2)(c) of NEPA, 42 U.S.C. § 4332(2)(c).⁷ *NRDC v. Callaway*, 524 F.2d 79, 87 (2d Cir. 1975); *NRDC v. Morton*, *supra*, 458 F.2d 827, 837; *Greene County Planning Board v. Federal Power Commission*, (*Greene II*), 490 F.2d 256, 258 (2d Cir. 1973).

Although this "rule of reason" is somewhat difficult to apply, it is clear that the rule is satisfied if the EIS has been written with objective good faith and if it provides enough information and discusses reasonably available alternatives to the proposed action. *NRDC v. Callaway*, *supra*, 524 F.2d at 92; *Chelsea Neighborhood Associates v. United States Postal Service*, 516 F.2d 378 (2d Cir. 1975). An environmental statement does not

⁷ That section provides in pertinent part:

(2) all agencies of the Federal Government shall

- (c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
 - (i) the environmental impact of the proposed action,
 - (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
 - (iii) alternatives to the proposed action,
 - (iv) the relationship between local short term uses of man's environment and the maintenance and enhancement of long term productivity, and
 - (v) any irreversible and irretrievable commitments of resources which would be involved if the proposed action should be implemented.

have to provide all the answers as to the environmental consequences of the proposed activity, but should set out those significant ones in which the answers are known. Then a decision can be made on the basis of what is known as well as what is not known, or not knowable, about the future environmental consequences of the proposal. *Scientists' Institute for Public Information v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1280 (9th Cir. 1973). In short, the Court must make "appropriate allowance for the inexactness of all predictive ventures." *Kleppe v. Sierra Club*, *supra*, 427 U.S. at 402, fn. No. 14 (1976).

The necessity of this "rule of reason" analysis is particularly evident for such federal action as oil and gas leasing in the OCS. It is difficult enough to predict future impacts for such specific "one-shot" projects as the construction of a dam or highway, but the difficulty is compounded a hundred fold when the essence of the project is speculative—a "gamble" for the lessees and the government. Precisely because of the continually evolving nature of OCS oil and gas activity, the Secretary has adopted procedures to continually monitor and control subsequent activity to protect against future environmental harm. The Fifth Circuit recognized that judicial review of OCS activity under NEPA had to take into account its unique character:

Plaintiffs contend . . . that the statement 'must stand the test alone—i.e., in and of itself it must either meet the requirements of NEPA or fail.' However, in a project such as this where developers sign leases and conduct separable operations over a period of months and years, and where restrictions in these leases give the agency the ability to constantly control and adjust future action, this continuing control must be considered in determining the reasonableness of the impact statement.

Sierra Club v. Morton, *supra*, 510 F.2d at 827-828. Judge Weinstein failed to apply the "rule of reason" precisely because he ignored this fundamentally important aspect of continuous environmental control over OCS activities.

Judge Weinstein found a NEPA violation not because the 40 EIS failed to discuss state and local authority but because he was not satisfied with the *quantum* of the discussion. The 40 EIS contains lengthy discussions of state and local authority over onshore development even to the point of an unconditional recognition of state control over this development:

Where the [development] plans involve onshore facilities, such as pipeline landing sites and onshore support facilities, the ultimate approval . . . would be within the jurisdiction of the State. (II 40 EIS 586).

The EIS continually recognizes that the use and location of pipelines, in particular, are dependent upon state and local authority. (II 40 EIS 20-21, 449-466, and 586; III 40 EIS 31). The very lease stipulation (No. 4) that is the basis for the assumption that pipelines may be used for Sale 40 production indicates at the outset that pipeline use is conditional upon state and local approval. (J.A. 32).

The only environmental significance of the use, as opposed to the location, of pipelines is the likelihood of increased oil spillage associated with transporting oil ashore by tankers. This possibility is expressly recognized in the 40 EIS (I 40 EIS 15, II 40 EIS 20-21) and a pessimistic estimate is made of the volume of oil that might be spilled over the life of the Sale 40 field if all of the oil is transported ashore by tanker. (II 40 EIS 30-32).

Judge Weinstein's preliminary injunction decision focused upon the 40 EIS treatment of the possibility that tankers might be employed in lieu of pipelines because of state and local "veto" of pipelines and found the discussion inadequate (J.A. 211-222). Apparently, in response to this Court's reversal of his prior decision, Judge Weinstein now has shifted to a conclusion that the EIS is inadequate because it does not predict the "site-specific" location of possible pipeline routes and also analyze the specific onshore impacts of those routes. (P.A. 46-58). Specifically, Judge Weinstein found that an effort should have been made in the EIS to determine specific pipeline routes that would be followed. He acknowledges that the 40 EIS contains a general description of the most likely routes for pipelines (J.A. 47) and that the 40 EIS specifically states that exact pipeline routes will be selected and studied when, and if, hydrocarbons in commercial quantities are found in the lease area (J.A. 48). Judge Weinstein, however, in direct contravention of the one Circuit decision on this subject, *Sierra Club v. Morton*, *supra*, concludes that the "deferral of an attempt to grapple with specifics (i.e., of pipelines) borders on irresponsibility. . . ." (J.A. 48-49).

We submit that this conclusion wilfully ignores the established legal precedent as well as the practical reality of OCS operations. When the plaintiffs raised this issue in *Sierra Club v. Morton*, *supra*, the Fifth Circuit readily concluded that the requirements of NEPA were satisfied by a general analysis of "the environmental problems that would result from pipeline construction" (510 F.2d at 823-824) and by the deferral of specific pipeline selection and analysis that Judge Weinstein characterized as "irresponsible".

In fact, the Fifth Circuit expressly approved the same system of pipeline corridor management that is proposed in the sale 40 EIS (II 40 EIS 457):

It [the EIS] further suggests that if it is determined that official establishment of pipeline corridors will constitute a major Federal action requiring preparation of an impact statement, then such will be prepared. Plaintiffs read this suggestion as an attempt to fragment the project, and, by gaining acceptance of some parts, compel acceptance of the whole. We do not agree that this is the thrust of Interior's proposal. This project is an easily divisible one. In this continuously controllable project, the fact that a tract may prove productive would not mandate that an unsound method of delivering that production be utilized. We are not unmindful of the role that the sufficiency of an EIS must be determined without reference to possible future action. Today's statement, however, includes sufficient pre-statement analysis of possible environmental hazards from pipeline location, construction or leakage.

Here, of course, the Secretary of the Interior has publicly committed himself to requiring a new and individually complete EIS on the pipeline proposals, if any, that might be submitted by Sale 40 lessees in the event of an oil strike (J.A. 3650). *A fortiori*, the Secretary's treatment of the pipeline impacts is completely responsible and in accord with the basic principles of NEPA.

Similarly, the Fifth Circuit approved the pipeline corridor management procedures insofar as they provided for coordination with coastal states—another area that Judge Weinstein found deficient under NEPA. 510 F.2d at 823-824.

The Fifth Circuit reviewed a lease stipulation governing the placement of pipelines which is also contained in the Sale 40 leases (Stipulation No. 4, J.A. 3235) and described the federal-state consultation process for pipe-

line placements similar to what has been and will be used here. The Court concluded on the basis of its review that:

These states have been forewarned by the EIS of the possible harm that may result from unrestricted construction and operation. Such efforts do not indicate any abdication of responsibility in violation of Interior's NEPA obligations, rather they evince the agency's fulfillment of NEPA requirements that . . . the Federal Government 'make available to States . . . advice and information useful in restoring, maintaining, and enhancing the quality of the environment.' [citations omitted]. 510 F.2d at 824.

We submit that the Fifth Circuit's decision that it is not necessary to project and study specific pipeline routes prior to the lease sale represents the correct application of the "rule of reason" and not Judge Weinstein's insistence that Interior speculate upon a virtually infinite number of possible routes. Moreover, we believe the record evidence cited by Judge Weinstein does not support his contention. Judge Weinstein relied exclusively upon the testimony of Franklin Brunjes, a Shell Oil Transportation Manager for his view that "site-specific" analysis of pipeline routes is feasible prior to obtaining exploratory information about the size and location of any hydrocarbon reserves.

Mr. Brunjes testified he had concluded, on the basis of a pre-sale cost-analysis conducted on behalf of Shell, that there was a great flexibility in the potential use of pipelines for lease Sale 40 at a cost significantly less than the cost of transportation by tankers. His testimony demonstrated that, within a tremendous range of alternative pipeline locations, pipelines will still prove to be technically and economically feasible and, as such, will be used in lieu of the environmentally less desirable tankers under lease stipulation 4.

Judge Weinstein quotes Brunjes' testimony out of context and then implies that Brunjes determined his hypothetical pipeline routes by analyzing "local zoning and related powers and opposition to pipelines" in a site-specific manner. (J.A. 54).^{*} Then Judge Weinstein holds this testimony up as proof of the feasibility of studying such site-specific pipeline locations for environmental impacts. Judge Weinstein's selective reading of Brunjes' testimony distorts the thrust of his testimony that Shell did not endeavor to study in detail existing state and local land use as it might affect pipelines because of the virtual impossibility of such a task.

The Shell study, like the 40 EIS, generally identified major land use criteria that might affect pipeline locations such as existing transportation corridors and terminal or refinery locations. (*See, e.g.*, II 40 EIS 227-229). These factors were employed only to obtain general areas where pipelines might be located. Thus, the greatest problem with using the Shell analysis for predicting "site-specific" environmental impacts of pipelines, as affected by state land use controls, is that the Shell pipeline routes were

^{*} For example, on the bottom of page 32 (J.A. 54) of the final memorandum decision, Judge Weinstein quotes almost an entire paragraph of Brunjes' testimony to demonstrate that Shell studied land-use restrictions in determining pipeline routes. The Judge omits, however, the first sentence of the paragraph which states "These are example routes," and the last sentence which states "We did not find in the course of our analysis that there were any laws that similarly excluded these types of transportation or these routes." (J.A. 1738-1739).

When the paragraph is read in the context of these two sentences, it is clear that Brunjes' statement means exactly the opposite of what Judge Weinstein implies that it means. Brunjes, in fact, is testifying that beyond generally ascertaining whether there were any laws specifically prohibiting pipelines, Shell simply took *example* routes without attempting to analyze the "site-specific" impact of particular local or state laws.

selected arbitrarily as a few typical examples from a virtually infinite range of such routes.

The Shell study was designed to predict economic costs and not to survey land use in New Jersey. Since the cost factors would not be affected if the pipeline is located within a 10 to 20 mile range of the hypothesized locations, it would be impossible to say anything more specific about the myriad state and local land use controls than what is already contained in the EIS. It would still be necessary, under the Shell scenario, to analyze the land use controls over virtually every inch of the New Jersey coast and to make predictions about how a multitude of local permitting authorities might respond to a pipeline right-of-way. Plainly, this is the kind of "crystal ball inquiry" that is beyond the requirements of the NEPA "rule of reason".

Two other things must be kept in mind that were omitted from Judge Weinstein's opinion. First, it must be recognized that the Secretary will do a specific environmental impact study of pipelines and other transportation alternatives at an appropriate time—after the completion of exploration and the submission of detailed development plans by the OCS lessees. Transportation, after all, is the very last step in the OCS process and does not even become a specific concern until exploration and development are completed and production begun. Although transportation may be an ultimate offshoot of the decision to lease, approval of an oil and gas transportation scheme is an entirely severable possible "major federal action" having a significant impact on the environment under NEPA, 42 U.S.C. § 4332(2)(c). So Secretary Andrus, by promising to prepare an EIS on transportation and related onshore development, is hardly abdicating his responsibility to take a "hard look" at the environmental consequences of specific pipeline alternatives.

The problem of isolating an appropriate unit of federal activity for study in an impact statement was recently addressed by this Court in *Greene County Planning Board v. Federal Power Commission* (*Greene IV*), — F.2d—(2d Cir., Slip opinion, Docket Nos. 76-4151 and 76-4153 December 8, 1976). In *Greene IV*, this Court held that consideration of a proposal for one power transmission line was an appropriate unit for an EIS without considering other related proposals for power transmission lines and without considering the possible future upgrading of the power line in question. The Court expressly recognized that:

[A] balance must sometimes be struck between the importance of going forward with a project presently under consideration and the danger of improperly "piggybacking" several related projects by justifying each of them on the assumption that the others are to be constructed, only to discover later that the overall combination of the projects may do more harm than good.

Slip opinion at p. 821.

We submit this Court's view in *Greene IV* is consistent with the Fifth Circuit's approach to the severability of environmental study of pipelines that might be generated by an OCS lease sale. *Sierra Club v. Morton*, *supra*, 510 F.2d at 824 (See discussion, *supra*, pp. 27-28). The lease sale does not mandate that pipelines or any other form of transportation be allowed to go ashore on the affected coastal states. It certainly does not dictate the location, type, or operation of such transportation systems. Viewed in the context of the continuing federal regulatory control over future development and the commitment to prepare and publicly circulate a development plan EIS prior to development plan approval, the 40 EIS represents a good faith compliance with the "environ-

mental full disclosure law." *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972).

In his final decision, Judge Weinstein also ignores the extensive "general" discussion of the environmental impacts of possible pipeline construction that is contained in both the 40 EIS and PEIS. Volume II of the 40 EIS, in particular, is replete with references to the impact of pipelines on the lease sale environment, both offshore and onshore. The probability of oil spills from pipelines is specifically analyzed and estimates of the frequency and quantity of spills are derived from the experience of OCS production in the Gulf of Mexico. (II 40 EIS 25-27). Hypothetical tanker spills are also projected on the assumption that all of the lease Sale 40 production will be transported ashore by tankers. (II 40 EIS 30-32). The 40 EIS then discusses the specific impact of an oil spill upon all of the various offshore biological communities (II 40 EIS 104-153), and onshore communities (II 40 EIS 316-336). The 40 EIS considers the impact of oil spills on offshore and onshore water quality (II 40 EIS 95-103, 336-342), upon commercial and sport fisheries (II 40 EIS 184-200), upon coastal beaches and their recreational use (II 40 EIS 292-302, 322-323), and upon onshore vegetation and wetlands (II 40 EIS 316-321).

The 40 EIS contains a similar analysis of the potential impact of dredging and construction for pipelines. Throughout the same sections dealing with the impact of oil spills on specific communities and activities, there is also discussion of dredging and pipeline construction in terms of the amount of heavy metals, sediments, and other pollutants that may be introduced into the environment. (e.g., impact upon: water quality, II 40 EIS 102-103; plankton, 114-115, 124-128; biological communities, 129-134, 136, 141; offshore flora, 143-145; fish, 149-152, 186; air quality, 164-166; general onshore impacts, 227-

229, 239-249; land use impacts, 279-291; recreation and tourism, 302-305; archaeologic and esthetic impacts, 309 and 313-315; onshore vegetation, 316; wetlands, 317-321; beaches, 322-323; birds, 328-330, etc.

This 40 EIS analysis of pipeline impacts leaves no doubt in the mind of the reader that any oil and gas pipelines engendered by lease Sale 40 shall have significant and specific effects on the physical and human environment of nearby coastal states. Even Judge Weinstein recognized in his earlier decision on the preliminary injunction that:

[B]ut, on balance, the impartial reader of the EISs is driven to the conclusion that within the limit of reasonable researchers and writers, a studied effort was made to present a fairly grim picture of possible environmental difficulties. If anything, the studies are almost too detailed and encyclopedic for the lay executive to fully comprehend. (J.A. 186).

We submit that the totality of the 40 EIS discussion of environmental impacts from pipelines more than satisfies the requirement of a "thorough study" of this aspect of the potential consequences of a decision to conduct lease Sale 40. Given the inherent difficulties in studying a dynamic project, such as OCS leasing, we submit that Judge Weinstein's conclusion that the Sale 40 EIS does not adequately consider state land use in relation to the environmental impacts of specific pipeline routes is clearly erroneous.

C. The Impact of the Coastal Zone Management Act Program on the 40 EIS Treatment of Potential Land Use Conflicts

In his final opinion Judge Weinstein brushed aside the reliance by the appellants on the ongoing federal-state-local planning process under the Coastal Zone Management Act (CZMA), as amended, 16 U.S.C. secs. 1451, *et seq.*, as an attempt to foist upon the states under the CZMA programs the Secretary's NEPA responsibility to make "an independent assessment" of the potential conflicts between federal, state, and local government controls and pipeline siting and design. (J.A. 35). Judge Weinstein further refused to consider the CZMA because the work being done on state coastal zone management programs will not be completed in the Mid-Atlantic states until 1978 at the earliest and finally because the "critical amendments to the CZMA were adopted after the Sale 40 EIS was published and the Secretary decided to hold the sale. Therefore those amendments could have had no impact on the Secretary's decision" (J.A. 35).

Judge Weinstein erred in underestimating the significance of the CZMA in mitigating any land use conflicts engendered by Sale 40. Judge Weinstein was also plainly in error in holding that the Secretary's EIS cannot take cognizance of and to an appropriate degree rely on the CZMA program, a program in which Judge Weinstein has twice recognized that all the Mid-Atlantic states are actively participating (Final memorandum, J.A. 35-36; preliminary injunction memorandum, J.A. 194).

Such new environmental legislation as NEPA and CZMA “* * * must be carefully meshed * * *” together with “* * * more traditional patterns of federal regulation,” *Aberdeen & Rockfish R. Co. v. SCRAP*, 409 U.S. 1207, 1218 (1972) (Burger, C.J. opinion in chambers denying application for stay). An EIS is not intended to be a substitute for local planning processes, *Concerned About Trident v. Rumsfeld*, — F.2d —, 9 ERC 1370, 1381 (D.C. Cir. 1976).

The fact that state CZMA programs for the Mid-Atlantic states cannot be expected to be completed until 1978 does not undercut the propriety of the Secretary referring to and relying on the planning and coordinating mechanisms of these state CZMA programs as an effective means to coordinate and accommodate state and local controls on the existence, design, and siting of pipelines and other nearshore and onshore OCS-related facilities. The district court previously found (preliminary injunction memorandum, J.A. 231) that the onshore impacts from the development of resources from Sale 40, including pipeline siting and construction, cannot begin until three years after leasing; i.e., not before 1979. Clearly, the Mid-Atlantic states' coastal zone management programs will be federally-approved before the production phase of Sale 40 can possibly begin. Consequently the detailed federal consistency provisions of Section 307(c)(3), 16 U.S.C. sec. 1456(c) will apply to any development and production plans that are submitted to the Secretary for approval. Section 307(c)(3)(B) (as amended in 1976) requires that the submission of such a development or production plan must be accompanied by a certification of consistency with the relevant states' approved management programs and a further certification that activities will proceed only in a manner consistent with such state programs. The affected states then review these certifica-

tions and the development or production plans to assure consistency.

Moreover, the Secretary cannot be faulted for referring to the CZMA process in the Sale 40 EIS because the amendments adding Section 307(c)(3)(B) were not enacted until during the preliminary injunction hearing. These amendments only served to make more explicit in the OCS context the prior requirements of federal consistency. Section 307(c)(3), now redesignated as Section 307(c)(3)(A). In addition, the Secretary's own regulations, 30 C.F.R. sec. 250.34(b) and (c), and lease stipulations in Sale 40, lease Stipulation No. 7, 41 F.R. 29437, 29439 (J.A. 3236) quite effectively *anticipated* the 1976 CZMA amendments by providing essentially the same consistency coordination with affected state and local governments.

At the time of development, decisions such as pipeline feasibility and acceptability can be meaningfully factored into the then-applicable state and local controls and CZMA programs. As recognized in *MAFLA* an overall OCS program is separable and merely because leases have been issued and producible resources have been discovered does " * * * not mandate that an unsound method of delivering that production be utilized," 510 F.2d at 824. Just as the Secretary's continuing control over an OCS project's post-sale stages " * * * must be considered in determining the reasonableness of the impact statement," for the lease sale, *MAFLA*, 510 F.2d at 828, (see discussion at pp. 25-29, *supra*), so, too, the continuing applicability of the federal CZMA mechanisms to factor state and local statutory and policy considerations into the OCS program must also be considered in judging the reasonableness of this Sale 40 EIS.

II.

The Secretary Did Not Violate NEPA In His Consideration Of The "Alternative" Of Separating Exploration And Development.

Judge Weinstein found, in parts C and D of his final memorandum, that the Secretary violated NEPA by failing to consider the "alternative" of separating exploration leasing from production leasing,⁹ even though such an "alternative" could only be implemented by a major legislative amendment to the OCS Lands Act.¹⁰ In reaching this conclusion, Judge Weinstein reversed his prior ruling on the preliminary injunction in which he found the EIS adequate under NEPA despite appellees' contentions at that time that there was inadequate discussion of the "alternative" of legislating separate exploration and production leases.

The only new evidence in the trial record on this question was the testimony of Judith Gresham, a staff employee of the New York OCS office, who stated under cross-examination by the Court that separating ex-

⁹ NEPA requires that an EIS contain a description of any alternatives to proposed action, 42 U.S.C. §4332(C) (iii) and additionally that the responsible federal official "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources," 42 U.S.C. §4332(D).

¹⁰ Section 8(b) of the OCS Lands Act, 43 U.S.C. § 1337(b) provides that oil and gas leases shall "be for a period of five (5) years and as long thereafter as oil and gas may be produced from the area in paying quantities. . . ." The Courts have uniformly construed this provision as mandatory that the lessee be allowed to explore and produce absent a specific violation of the other terms of the Act. See e.g., *Gulf Oil Co. v. Morton*, 453 F.2d 141 (9th Cir. 1973); *Union Oil Co. v. Morton*, 512 F.2d 743 (9th Cir. 1975).

ploration and development was not specifically considered as part of the tentative tract selection process. (J.A. 1698-1701). From this testimony, Judge Weinstein reached the conclusion that "the government never considered exploration to determine the extent of oil and gas reserves, and their location before granting exclusive rights of production." (J.A. 81). This conclusion is simply wrong and completely misconstrues the testimony of Ms. Gresham.

Record evidence in this case that was overlooked by the Court clearly shows that the question of separating exploration and development was debated and discussed over many years in Interior. In March, 1975, for example, Interior's Office of OCS Program Coordination prepared a working paper entitled "Government Exploration of the OCS" (J.A. 2623-2654). Although this paper concluded that government exploration was not desirable, it did suggest other modifications of the leasing program that might create a pause between exploration and development (*Id.*). In June, 1975, Interior circulated for in-house consideration a "Position Paper on Separating of Decisions to Explore and to Develop OCS Areas" (J.A. 2655-2669). This paper presented four options for Departmental action in response to outside proposals for separating exploration and development to provide a more effective means of coordinating state and federal decisions. As a result of this internal discussion, the Secretary announced in August, 1975, that Interior would amend the OCS operating regulations to create a formal pause between exploration and development to provide the states with exploratory information prior to making final decisions on development plans submitted by OCS lessees. (Final regulations, Federal Register, November 4, 1975, 40 F. R. 51199).

The question of separating exploration and production leasing was also considered in the PEIS (II PEIS 353-

354, 392-393), the Programmatic PDOD on the OCS Accelerated Leasing Program at pp. 32-35, (J.A. 3127-3130) and in the 40 EIS (II 40 EIS 582-583, III 40 EIS 67).

Judge Weinstein acknowledges this discussion of separating exploration and development but characterizes it as "mere window dressing" (J.A. 86) because of his misconception of Ms. Gresham's testimony. Ms. Gresham's testimony dealt exclusively with the tract selection process for Sale 40. What Judge Weinstein apparently failed to understand is that the selection process is merely the creation of the proposal for action which is then the subject of environmental study under NEPA. If Judge Weinstein's conclusion is sustained, this Court would be requiring the Secretary to consider "alternatives" even before there is a proposal for federal action and before the preparation of an EIS on that proposal.

The Supreme Court has squarely rejected the view that environmental issues be considered at every stage of the decision-making process. *Aberdeen & Rockfish Railroad Co. v. SCRAP* (SCRAP II), 422 U.S. 289 (1975). On the contrary, the Supreme Court held the timing of an EIS was not affected by the statutory language that the EIS accompany "the proposal" through agency review processes and that a final EIS is not required until the time when the agency acts upon the proposal. *Id.* at 320. One court has specifically applied *SCRAP II* to OCS leasing and has held, contrary to Judge Weinstein, that tract selection did not have to be preceded by an EIS. *People of the State of California v. Morton*, *supra*, 404 F. Supp. at 31.

In fact, in the *MAFLA* decision, the Fifth Circuit upheld the adequacy of the lease sale EIS even though it contained *no discussion* of federal exploration prior to development. The Fifth Circuit simply found that federal

exploration (or, presumably, separate leasing for exploration and production) was not an "alternative" to the lease sale under NEPA:

Plaintiffs are critical of the statement's failure to discuss federal exploration. We reject this criticism. The court below correctly observed: "[t]he short answer to plaintiffs' argument is that federal exploration is not an alternative *to* the project, but merely another means of proceeding *with* the project so that the environmental consequences should be substantially the same in either case." We agree that Federal exploration would present substantially the same environmental hazards as permitting private developers to explore the tracts sold. 510 F.2d at 825.

If separation of exploration and development is not environmentally relevant to the lease decision itself, *a fortiori*, it has no relevance of any kind to the tentative tract selection decision.

Finally, Judge Weinstein misconstrued established judicial precedent on the "rule of reason" as it applies to a discussion of an alternative requiring fundamental changes in existing legislation. Judge Weinstein cites the D.C. Circuit opinion in *NRDC v. Morton*, 458 F.2d 827 (1972) for the proposition that an EIS must consider alternatives requiring legislative implementation (J.A. 89). Yet the Court in *NRDC v. Morton*, expressly stated that although alternatives requiring legislative implementation are not automatically exempt from NEPA scrutiny:

There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of "alternatives" put forward in comments when these effects cannot be readily

ascertained and the alternatives are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies. . . . 458 F.2d at 837-38.

The above statement is consistent with this Court's view in *NRDC v. Callaway*, *supra*, that the discussion of alternatives is subject to a requirement of reasonableness and that there is no need to consider "alternatives which could only be implemented after significant changes in governmental policy or legislation. . . ." 524 F.2d at 93.

Judge Weinstein's decision on the adequacy of the EIS treatment of separating exploration and development appears to stem from his personal disagreement with the *substance* of the existing governmental legislative policy. Thus, he discounts Interior's concern that federal exploration would produce a "hostile reaction" from industry as being "untenable" (J.A. 87). He also excoriates Interior for being reluctant to incur the additional financial burden of Federal exploration:

The reason would be acceptable were it put forward by a small, poor, developing nation. It seems incredible when it comes from spokesmen of the most powerful government in the world whose budget is measured in the hundreds of billions of dollars. (J.A. 87).

What is important is not that these observations are debatable, but that it is legally inappropriate for the Court, however tenuous, to base its NEPA ruling on a substantive disagreement with the wisdom of the Secretary's policy. As this Court stated in a NEPA decision:

[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the

agency. [citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)].

* * *

. . . we will not allow our personal views as to the desirability of the result reached by the Commission to influence us in our decision.

Scenic Hudson Preservation Conference v. Federal Power Commission 453 F.2d 463, 468 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972). We respectfully submit that Judge Weinstein did indeed allow his personal views as to the desirability of separating exploration and development to influence his decision on the Secretary's NEPA responsibilities with respect to this issue.

III.

It Was Improper For The District Court To Invalidate Lease Sale 40 On The Ground Of An Allegedly Insufficient Cost-Benefit Analysis.

Judge Weinstein, despite his disclaimer that he was not doing so (J.A. 80), engaged in impermissible substantive review of the Secretary's decision when he invalidated lease Sale 40 on the ground of a "defective cost-benefit" analysis. To compound this error, Judge Weinstein reached this conclusion on the basis of a new record developed entirely in the hearings before the district court. Judge Weinstein weighed this *de novo* testimony against the Secretary's administrative record evidence, reached his own conclusion, and declared that the Secretary's contrary conclusion was arbitrary and capricious (J.A. 81). Even beyond the point that such *de novo* review on a court-generated record is improper, Judge Weinstein's analysis of even this new record was in error. Moreover, NEPA does not contemplate the rigorous cost-benefit analysis Judge Weinstein envisions.

First and foremost, a court's limited function in a case challenging the adequacy of an EIS has been spelled out by the Supreme Court in *Kleppe v. Sierra Club*, *supra*, 427 U.S. at 410, fn. 21:

Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. See *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463, 481 (C.A. 2d 1971), *cert. denied*, 407 U.S. 926 (1972). The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken." *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838, 148 U.S. App. D.C. 5, 16 (1972).

This same standard of review was alluded to in this case by Mr. Justice Marshall when he declined to vacate this Court's stay of Judge Weinstein's preliminary injunction. *State of New York, et al. v. Kleppe*, *supra*, 97 S.Ct. at 7 (1976).

Judge Weinstein's discussion of the cost-benefit analysis he deemed requisite here was aimed at purely the economic considerations of the lease sale, factors such as the cost in dollars per mile of pipelines, the investment costs of finding and producing oil and gas resources and the possible resource reserves and potential peak production rates. Judge Weinstein concluded that the economic costs and benefits were inaccurate so that there could be no adequate balancing of economic benefits against environmental costs (J.A. 81). Thus, his review of the cost-benefit analysis purportedly required by NEPA was based not on considerations of environmental consequences but strictly on economics. This review is beyond the proper scope established by *Kleppe*, *supra*.

Even those courts of appeals which have granted some substantive review under NEPA have limited such review to application of the arbitrary or capricious agency action standard of the Administrative Procedure Act (APA), 5 U.S.C. sec. 706(2)(A). See, e.g. *Scenic Hudson Preservation Conference, supra*; *Calvert Cliffs Coordin. Comm. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971); *Minnesota Public Interest Research Group (MPIRG) v. Butz*, 541 F.2d 1292, 1300 (8th Cir. 1976). It was this standard that Judge Weinstein purported to apply here.

Assuming, *arguendo*, such review exists it is clear that the scope of this review is extremely narrow and does not include judicial power to substitute the court's judgment for that of the agency. *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 287 (1974); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *MPIRG, supra*, 541 F.2d at 1300-1301. It is also clear that a court can only conduct such review by examination of the record already in existence before the agency when the Secretary acted, rather than " * * * some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Judge Weinstein was even bound to " * * * uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, supra*, 419 U.S. at 285; *Hooker Chemicals & Plastics v. Train*, 537 F.2d 620, 632 (2d Cir. 1976). In no event should the court's review extend to " * * * challenges to the factual bases for the Secretary's conclusion * * *," *Dunlop v. Bachowski*, 421 U.S. 560, 573, 576-577 (1975).¹¹

¹¹ Only when there is no discussion in the administrative record of statutory prerequisites to action is it appropriate for a court to go beyond the existing agency record and even then the court should only require further explanation from the agency. *Overton Park, supra*, 401 U.S. at 420; *Camp, supra*, 411 U.S. at

[Footnote continued on following page]

Yet on the issue of costs and benefits Judge Weinstein permitted precisely such a challenge to the Secretary's factual bases to be presented at trial by plaintiffs' witness George L. Donkin, an economist, and then Judge Weinstein relied solely on Donkin's testimony, reproducing "substantial portions" in his final opinion (J.A. 66-78) and crediting the figures there presented *in toto*¹² to conclude that the Secretary's EIS analysis was so erroneous as to make his decision arbitrary and capricious. This *de novo* review of the factual accuracy

143. There is obviously a quite sufficient analysis of the relevant NEPA factors in the Sale 40 EIS. Judge Weinstein does not identify any factor that was *omitted*, instead he directly challenges the accuracy of the record facts by the use of facts developed outside that agency record for the first time at trial from one witness, George Donkin, who was not in anyway involved in preparing the Sale 40 EIS for the Secretary and was not employed by the Secretary in any capacity when the EIS was prepared and the sale decision made. The Sale 40 EIS is certainly sufficient to permit judicial review without further agency explanation, *Hooker Chemicals, supra*, 537 F.2d at 636, and the district court twice declined to hold that the Secretary acted in bad faith in preparing and considering this EIS, even recognizing that it should not inquire into the agency's internal deliberations absent strong showings of bad faith, citing decisions of this Court in *National Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974) and *Andrews v. Knowlton*, 509 F.2d 898, 906-907 (2d Cir. 1975) (J.A. 105-106 and 187-190).

¹² Without any discussion, Judge Weinstein noted that Donkin's testimony was "unshaken by cross-examination." (J.A. 67). Although discussed in more detail, *infra*, Donkin's testimony was not only undercut substantially by cross-examination, on the matter of pipeline costs per mile, Donkin's testimony was directly in conflict with the testimony of Mr. Franklin Brunjes, Manager of Land Transportation for Shell Oil Company, that the Secretary's \$1,000,000 per mile figure was reasonable. (J.A. 1845-1846). Judge Weinstein simply ignored this clear conflict, even though he credited Brunjes' testimony "in full" (J.A. 64).

of the Secretary's record bases for his NEPA analysis and sale decision was not only beyond the proper scope of judicial review under NEPA, *Kleppe, supra*, but even beyond the proper scope of review under the arbitrary and capricious standard of the APA, *Dunlop, supra*; *Camp, supra*; *Bowman Transportation, supra*; *Overton Park, supra*, if that standard is deemed applicable.

This error is compounded by the fact that the economic information criticized by appellees' expert was not even part of the EIS. Rather, this information was set forth in the PDOD for Sale 40 that, at best, can be described as an internal summary of various information for the Secretary. We submit that NEPA does not contemplate judicial review of matters outside the EIS. *Chelsea Neighborhood Ass'n v. Postal Service*, 516 F.2d 378, 389 (2d Cir. 1975); *Sierra Club v. Froehlke*, 486 F.2d 946, 953 (7th Cir. 1973).

Indeed, judicial review of this kind of internal discussion document is generally not allowed under the APA. As one court has stated the issue:

To probe the summaries of record evidence would be the same as probing the decision-making process itself. To require disclosure of the summaries would result in publication of the evaluation and analysis of the multitudinous facts made by the Administrator's aides and in turn studies by him in making his decision. Whether he weighed the correct factors, whether his judgment scales were finely adjusted and delicately operative, disappointed litigants may not probe his deliberative process.

Montrose Chemical Corp. v. Train, 491 F.2d 63, 68 (D.C. Cir. 1974); see also *National Nutritional Foods Assoc. v. FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974). Judge Weinstein's probing of the material contained in this internal deliberative memorandum is indicative of his impermissible substantive review generally of the Secretary's decision.

Even assuming that review of the PDOD was permissible, Judge Weinstein has distorted the concept of a NEPA cost-benefit analysis. Effectively, Judge Weinstein restructured NEPA's requirement that an EIS present a " * * * broadly defined cost-benefit analysis * * * [which] seeks to insure that more than economic costs alone are considered * * *," *Chelsea Neighborhood Ass'ns v. United States Postal Service*, *supra*, 516 F.2d at 386-387 into a rigorous, mathematically precise cost-benefit study of the type required under other statutes in the context of other projects such as dams to be constructed with federal funds.¹³ NEPA imposes no such rigorous cost-benefit calculus requirement, *Daly v. Volpe*, 514 F.2d 1106, 1111-1112 (9th Cir. 1975); *Sierra Club v. Morton*, *supra*, 510 F.2d at 827; *Trout Unlimited v. Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974). Judge Weinstein imposed a requirement of a precise and detailed cost-benefit analysis on the Secretary's PDOD. The decision does not fault any of the EIS's presentation of environmental costs, merely the PDOD consideration of economic costs.

The relevant judicial concern should be whether the reasonably probable environmental and socio-economic elements have been identified, not the specific numbers assigned to each element. The Fifth Circuit's reasoning

¹³ See e.g., *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

in *Sierra Club v. Morton*, which we have noted was also a challenge to the adequacy of an EIS for an OCS lease sale, correctly describes the standard to be applied in assessing the "cost-benefit" issue. There the court noted (510 F.2d at 827):

** * * every attempt to assign a dollar value to future effects of present actions necessarily involves prediction. Such opinion estimates can be most precise when the systems involved are simple. As they become more complex and interactive, the ability to forecast becomes more a guess and less a prediction.*

The MAFLA development is in the complex, interactive category. The decisionmaker's task nevertheless remains the same. It is not to total up dollars and cents in a sort of profit-loss ledger, but rather to consider the previously unconsidered by giving weight and consideration to the ecological costs to future generations in deciding whether present economic benefits indicate that the depletion of irreplaceable natural resources should proceed in the manner suggested, or at all. The use of a postulated economic equation to express these values is permissible and in many instances desirable, but it is not a sine qua non. The MAFLA statement, by giving the decisionmaker and other readers enough detail concerning all of these costs and benefits to permit reasoned evaluation and decision, meets the Section 102(2)(c)(iv) requirement that long-term environmental costs be weighed against immediate benefits. (Emphasis added.)

See, also *Daly v. Volpe*, *supra*, 514 F.2d at 1112.

Judge Weinstein's use of Donkin's testimony, beyond our objections presented above, to invalidate the lease sale

is improper since the differences between the Secretary's projections and Donkin's, even assuming for argument that comparability of the two opinions is possible, is nothing more than a disagreement among experts. See, *Cady v. Morton*, 527 F.2d 786, 796 (9th Cir. 1975); *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973), *cert. denied*, 416 U.S. 916 (1973).

Moreover, as seems evident from a mere recital of Donkin's sources, there is a total lack of comparability between Donkin's figures and the Secretary's EIS figures.¹⁴ We deal with these matters seriatim.

1. Underestimate of finding costs.—Donkin merely extracted selected figures from the Secretary's table of capital requirements labeling these as "finding costs" and *assumed* this figure should be comparable to the FPC's finding cost methodology (J.A. 1887-1890). Yet Donkin conceded that one category of the FPC figures "exploration overhead," would not be a capital investment cost (*Id.*). Since the Secretary only purported to estimate this latter cost there is no basis for the comparison. Donkin further assumed that the Secretary's figures included such items as wages during pre-production activity (J.A. 1832), yet the EIS, in a section Donkin did not bother to read (J.A. 1866), clearly indicates that wage costs were *not* considered as capital investment costs, Sale 40 EIS, Vol. II, pp. 223-225. Judge Weinstein completely ignored these trial record facts.

¹⁴ Donkin's analysis was based on the Secretary's internal briefing and decision document, the so-called PDOD, which accompanied the Sale 40 EIS to the Secretary's desk. While admission of this PDOD below was at best questionable, *Montrose Chemical Corp. v. Train*, *supra*, it is beyond us how the district court could rely only on Donkin's testimony to invalidate the EIS where Donkin conceded he examined only the PDOD and the alternatives section of the EIS and did not bother to read the rest of the EIS (J.A. 1865-1866).

2. Underestimate of pipeline construction costs.—

Donkin's pipeline cost-per-mile figure of more than \$1.7 million was based exclusively on *one* submission to the FPC on one pipeline. That submission is itself based on pipelines going exclusively between one offshore area of a producing field and another offshore area in that field (J.A. 1877-1878). It is therefore not comparable to the field-to-shore transmission pipeline situation involved here and on which the Secretary based his projected cost per mile at \$1 million. Judge Weinstein completely ignored this obvious difference as well as the uncontroverted evidence of Mr. Franklin Brunjes, a witness whose testimony Judge Weinstein credited in full (J.A. 64), which corroborated precisely the Secretary's \$1 million per mile figure (J.A. 1845-1846, 1850-1851).

3. Underestimate of total investment required. Since Donkin's testimony on this point was merely a combination of the two points above, the same comparability defects apply.

4. Overestimate of peak levels of production. Donkin's conclusion that the Secretary overestimated the peak production level possible from the Sale 40 area was premised entirely on an *assumed* production decline curve (J.A. 1856-1857, and 1862b). That decline curve can be readily extrapolated to the point of total reserve production (i.e. the point at which all the oil and gas has been removed). This calculation indicates a total field life for the field on which Donkin's curve is based of about 30 years. The Secretary, as clearly indicated in the EIS at Vol. 1, p. 17, based his peak production figure on an estimated field life of 25 years, based on past OCS experience. The 20% by which Donkin concludes that the Secretary overestimated the peak production level coincides with the 20% by which Donkin overestimates the potential field life. Again Donkin's analysis is merely based on a dif-

ferent set of assumptions than the Secretary's; the two analyses are simply not comparable.

Moreover if the Secretary erred at all, he erred on the side of presenting the worst case situation for environmental impacts since if anything his overestimate of peak production would entail *greater* potential environmental impact than will actually occur. The EIS certainly should not be faulted for presenting the worst case situation.

Judge Weinstein's entire use of Donkin's testimony violated established principles of judicial review both under NEPA and under the arbitrary and capricious standard of the APA. Judge Weinstein was misusing NEPA as "* * * a crutch for chronic fault-finding." *Life of the Land, supra*, 485 F.2d at 467, 472.

IV.

It Was Improper For The District Court to Declare Lease Sale 40 Null And Void.

In the remedies section of his final decision, Judge Weinstein sets up three alternative remedies to the alleged NEPA violations which include, *inter alia*, 1) nullify the sale and enjoin all lease activity; 2) "ignoring" the NEPA violations; and 3) creating a "coordinating" agency to integrate federal, state, local and industry planning for OCS oil and gas operations. Judge Weinstein proceeds to knock down the latter two "straw men" remedies and concludes that the best compromise between doing nothing and judicially legislating a new OCS program is to simply declare the sale null and void.

Judge Weinstein's decision virtually ignores the fact that six Federal appellate judges, including a Justice of the United States Supreme Court, reviewed his prior decision granting a preliminary injunction and unanimously agreed that the lease sale itself did not constitute irreparable injury to the plaintiffs. Furthermore, this Court previously concluded that "the national interests, looking toward relief of this country's energy crisis, will be clearly damaged if the proposed sale is aborted." — F.2d —, (Slip opinion, August 16, 1976, staying the preliminary injunction, Docket No. 6122. (J.A. 355-356)).

There can be no question that fundamental principles of equity govern the grant of injunctive relief under NEPA, despite the position adopted by appellees below that a violation of NEPA, in and of itself, warrants injunctive relief. See, e.g., *The State of New York v. The Nuclear Regulatory Commission, et al.*, — F.2d —, (2d Cir., Slip opinion, February 14, 1977, Docket Nos. 75-6115, 76-6022, 76-6081); *The East 63rd Street Association v. Coleman* (2d Cir., Order, May 18, 1976, Docket No. 76-6083) ("We also note that even if there were violations of the National Environmental Policy Act, which we by no means find, the district court has substantial discretion to determine whether an injunction should issue." *Id.*)

Thus, it is clear that a basic prerequisite to all equitable relief under NEPA is a showing of "immediate, demonstrable and irreparable damage to the environment." *The State of New York v. The Nuclear Regulatory Commission, et al.*, *supra*, Slip opinion at 6193. Beyond some general discussion of the possible commitment of resources involved in the lease sale, Judge Weinstein did not identify any irreparable injury that would flow from the alleged NEPA violations because he could not.

All of the alleged NEPA violations in question either do not have a direct impact on the environment (e.g., sepa-

rating exploration and development, revising the cost-benefit analysis) or the potential impact is several years in the future as was recognized by this Court in the decision staying the preliminary injunction. (J.A. 355-56). For example, the specific impacts of the NEPA violations found by Judge Weinstein relate to pipelines or other transportation schemes. It is self-evident that the transportation of the oil is the very last step in the OCS lease development activity and does not even become a concern until well after the exploration has been completed. The Secretary retains complete control over both the location and use of pipelines or tankers in the future. If, indeed, NEPA requires additional environmental study of the transportation mechanisms, the fruits of this study would still "serve the purpose it was intended to serve—that of insuring that federal projects having a significant effect on the environment might proceed only on the basis of a 'careful and informed decision-making process' [citation omitted]." *State of New York v. Nuclear Regulatory Commission*, *supra*, Slip opinion at 6192-6193. The oil transportation decisions are many years away and, as indicated by the new Secretary in his recent press announcement, will be the subject of a complete and independent EIS scrutiny under NEPA prior to such decisions being made.

The other traditional equity principle that must be taken cognizance of here is the weighing of the harm to the defendant and to the public interest. We submit this Court's prior conclusion on this score is unequivocal—the potential harm to the environment during the exploratory phase of the lease sale is decidedly outweighed by the national interest in obtaining new domestic sources of energy as soon as possible.

The recent decision of the Court of Appeals for the District of Columbia on the Navy's Trident submarine

program, *Concerned About Trident v. Rumsfeld, supra*, 9 E.R.C. 1370, is a clear example of a court refusing to enjoin a strategically important federal program even though the court found some NEPA violations and remanded the case to the agency for revisions of the Final EIS.

The D.C. Circuit declined to issue injunctive relief in that case because of its conclusion that:

As the Navy has taken no arbitrary or capricious action here but has attempted to comply in good faith with the mandates of NEPA, failing in only two instances, we do not believe that the issuance of an injunction pending the Navy's revision of the Final EIS is necessary, especially since we have found that the Navy gave proper weight to environmental considerations in deciding to proceed with this strategically important project. [citations omitted]

9 E.R.C. at 1382. We submit that the record in this case demonstrates at the very least that the Secretary did attempt to comply with NEPA in good faith. Thus, as in *Concerned About Trident, supra*, injunctive relief should not be granted even if, *assuming arguendo*, the Secretary has violated NEPA in any of the ways suggested by Judge Weinstein.

We also respectfully submit that Judge Weinstein's invalidation of the leases appears to be in complete violation of the OCS Lands Act, 43 U.S.C. § 1331, *et seq.*, which provides the sole statutory basis for determining the validity of OCS oil and gas leases. *Union Oil Co. v. Morton, supra*; *Gulf Oil Co. v. Morton, supra*. It is clear that NEPA does not vest a court with authority to exceed the jurisdictional limitations of a pre-existing statute. *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289 (1975); *United States v. SCRAP*, 412 U.S. 669 (1973).

Judge Weinstein's order invalidating the sale and enjoining all lease activities was clearly erroneous as a matter of law and, because of the potential magnitude of harm to the public, constituted an abuse of his discretion. In addition to the obvious harm ensuing from delay of Sale 40 exploration,¹⁵ restoring a sealed bidding sale of this magnitude in the future would drastically undermine the fairness and effectiveness of the bidding since the precise valuation of the competing bidders is now known for each of the 93 leased tracts. The underlying purpose of the federal secret bidding procedures would be seriously compromised at any subsequent sale.

We do not concede for a moment that the Secretary has violated NEPA in any respect. However, if the Court should determine that a supplemental or amended EIS must be prepared and considered, we believe there is no demonstrable need to invalidate the sale itself in view of the continuing environmental controls maintained by the Secretary over all future lease activity.

¹⁵ See *e.g.*, Affidavit of Cecil D. Andrus submitted in support of the federal appellants' motion to expedite the appeal herein. (J.A. 3648).

CONCLUSION

It is respectfully submitted that the final judgment of the District Court declaring OCS lease Sale 40 null and void and granting a permanent injunction under NEPA should be reversed and judgment should be entered dismissing the complaints herein.

Respectfully submitted,

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STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Mary Spring

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 15th day of April 1977 he served a copy of the within

FEDERAL APPELLANT'S BRIEF

by placing the same in a properly postpaid franked envelope addressed to:

LIST ATTACHED

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Mary Spring

Sworn to before me this

15th day of April 1977

Stella B. Magier

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Qualified in Kings County
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